

MOTION FILED
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No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Oklahoma

**MOTION OF OKLAHOMA INDUSTRIES AUTHORITY
FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND
BRIEF IN SUPPORT OF THE PETITION**

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January, 1984

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QUESTION PRESENTED

Whether, under the Contract, Due Process and Taking Clauses, a state may impair its own obligations under a financial contract, which has been fully and irrevocably performed by the other party to the contract, through a retroactive application of an unforeshadowed state Attorney General's opinion and a state court decision.

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**MOTION OF OKLAHOMA INDUSTRIES AUTHORITY
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

Oklahoma Industries Authority ("OIA"), pursuant to Rule 36.1 of this Court, respectfully requests leave to file a brief *amicus curiae* in support of the Petitioner, General Motors Corporation ("General Motors"). The Petitioner and Respondent-Intervenor have consented to OIA filing such a brief, but the Respondents have not consented.

Respondents initially consented orally to the filing of the brief, but then withdrew their consent after *amicus* had submitted the brief to the printer.

OIA is an agency of the State of Oklahoma. With General Motors, OIA is a party to the tax abatement contract which is the subject of this litigation.

The Statement of Interest of *Amicus* is contained in the brief submitted.

WHEREFORE, OIA respectfully requests that it be granted leave to file a brief *amicus curiae*.

Dated: Oklahoma City, Oklahoma, January 26, 1984.

Respectfully submitted,

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**BRIEF AMICUS CURIAE
OF OKLAHOMA INDUSTRIES AUTHORITY**

**INTEREST OF AMICUS CURIAE
OKLAHOMA INDUSTRIES AUTHORITY**

Oklahoma Industries Authority ("OIA") submits this brief *amicus curiae* in support of General Motors Corporation's ("General Motors") Petition for a Writ of Certiorari to the Supreme Court of Oklahoma.¹

The Oklahoma Industries Authority is a "public trust" created pursuant to 60 O.S. §176, *et seq.* (the Oklahoma "Trusts for the Furtherance of Public Functions" Act). It is an agency of the State. With General Motors, OIA is a party to the tax abatement contract which is the subject of this litigation.

¹ References to opinions and orders of the Oklahoma Supreme Court shall be to the Petitioner's Appendix; References to the Record (R.....) are to the record on appeal in the Supreme Court of Oklahoma in *General Motors Corporation v. Oklahoma County Board of Equalization, et al.*, No. 58,438.

Since its inception in 1966 and prior to July 31, 1979, the OIA, in cooperation with other State agencies, including the Governor's office, the Attorney General's office and the Tax Commission, sought to induce businesses to locate and to expand in Oklahoma for the purposes of strengthening the economy and producing jobs. Between the fall of 1976 and the spring of 1978, OIA sought to induce General Motors to build a \$288 million automobile plant in Oklahoma. The primary inducement was tax abatement.²

The State of Oklahoma and OIA agreed with General Motors that if the plant was built in Oklahoma it would not be subject to property tax for twenty years. The means for tax abatement in Oklahoma was to vest title to a plant in a public trust and lease it to the business for the period of the abatement. This is similar to sale and leaseback methods used by other states for tax abatement. The procedure involved also the issuance of \$1 million of bonds by OIA for partial financing of the plant. General Motors built the plant in Oklahoma and it opened for business in April, 1979. It consists of seventy acres under roof. Five thousand new jobs were produced.

But three months after the plant was completed, on July 31, 1979, a newly elected Attorney General withdrew a former Attorney General's Opinion on which OIA and

² The record shows that original General Motors' plans to build a plant in Oklahoma in 1973 were scrapped when the Arab oil embargo reduced automobile assembly requirements. By the time that the business outlook improved to justify the plant in 1976, a major tax abatement concession for a Volkswagen plant had been made by the state of Pennsylvania. In reaction to that, General Motors had changed its policy to require a competitive tax abatement allowance from states which chose to compete for a new General Motors plant. R. 801, Edman Dep. p. 13.

General Motors had relied. He substituted a contrary opinion, ruling that such properties are taxable. In Oklahoma, opinions of the Attorney General are binding on public officials, so the County Assessor assessed the plant and it was taxed.³

The OIA has an interest in this litigation as a party to the tax abatement contract. OIA believes that it has an obligation to do all that it can to see that General Motors receives the benefits for which it bargained, and which were represented by OIA and by all public officials involved to be lawfully available.

OIA has an added interest. According to the *"Inventory of Tax Exempt Industries and Commercial Real Property"* published by the State Tax Commission for the Legislature on July 21, 1979, more than 340 industries and businesses located in 58 counties of Oklahoma received tax abatements under this procedure. Ninety-five of those projects were sponsored under contracts with the OIA. Many of the firms involved are in a position like that of General Motors.

³ The tax payments have not been disbursed or budgeted. They are held and invested by the County Treasurer pursuant to 68 O.S. 1981, §2467 (b) pending outcome of the protest and litigation. The General Motors account totals \$10,276,519.00 as of January 1, 1984.

ARGUMENT

I

Industrial Tax Abatements Generally, and This Particular Tax Abatement Contract with General Motors, Were Approved by the Highest Officials of Oklahoma.

The Honorable David Boren, now U. S. Senator, who was Governor of Oklahoma at the time of the tax abatement contract with General Motors, testified in a deposition in this case that state employees in the executive branch of government had long understood that tax abatements were lawful. He testified that the State had formulated a policy to utilize tax abatements to attract industry, and it was carried out "very, very aggressively." As to the situation just prior to the General Motors contract, Governor Boren testified:

"The situation was not exactly like it is now, with our economic boom [deposition of January 7, 1982]; we were — we were certainly hungry for industry at that time [in the fall of 1976] and so were the other states of the sun belt." R. 804, Boren Dep. p. 8. [At that time] "there were a lot of people who were both unemployed and underemployed in Oklahoma, employed in jobs where wages were low. There was a great need for economic development in the state and we very, very aggressively pursued it." R. 804, Boren Dep. pp. 4-5. . . . "I think we had to offer at that time and that's the reason our Industrial Development Department aggressively did so; we were meeting the competition of other states; we were trying to attract industry; we had people here who needed jobs; our state was pulling itself up, and to do so, we wanted those payrolls here and we wanted those jobs, and that's the reason we offered those inducements." R. 804, Boren Dep. p. 56.

There was steadfast support from the other offices of state government to ensure that the policy was carried out. The Secretary-Member of the Tax Commission testified as follows regarding the position of the Tax Commission and the assurances which he gave to General Motors:

"Yes, I would definitely say that was the purpose probably for the Tax Commission speaking to those subjects, to assure Mr. Hoffman and, therefore, General Motors that under proper conditions the law did legitimately provide for certain exemptions, and you might call it, oh, in a way an advance ruling on the part of the Tax Commission that if those conditions were met, this would be the construction and interpretation of the law that would be followed." R. 805, Merrill Dep. p. 17,

and:

"My words for it would be to give them a short course or a cram course in Oklahoma tax law, to shortcut the process to obviate the need for their lawyers to do a lot of research in certain key tax areas." R. 805, Merrill Dep. p. 14.

The importance of the project and the benefits to be derived by Oklahoma from an automobile plant of this magnitude were well understood by state representatives:

"We knew we were dealing with the largest privately owned manufacturing facility that had ever been located in the State of Oklahoma in terms of its size and its advanced technology, and it was reported to be the largest assembly plant ever constructed by this company, which is the largest manufacturing company in the world.

And we felt that the location of this plant would be a — of great economic benefit to the State of Okla-

homa, and it brought with it, of course, a great many other benefits for the community that accrue to the areas in where these plants locate. . . . So we felt that this location, that this plant that was being competed for by at least five states to my knowledge, if it could be located in Oklahoma, it would be of great value to the State." R. 807, Strasbaugh Dep. pp. 10-11.

On October 4, 1976, the bargaining agent for the OIA wrote to General Motors concluding as follows:

"The purpose of this letter, in line with the longstanding legislative policy; Attorney General Opinions; and Supreme Court decisions; is to induce General Motors to erect this facility in the State of Oklahoma to implement this longstanding legislation to create jobs in the State of Oklahoma." R. 807, Strasbaugh Dep. p. 20.

The Legal Counsel and Assistant General Manager of OIA was clear in his opinion that there were no legal impediments in the Oklahoma tax abatement procedure. He expressed that opinion to General Motors in what he termed a "comfort" meeting as follows:

"Well, it [memorandum of the meeting] doesn't reflect the — the unusual enthusiasm and encouragement that was being given to General Motors by all of the people that were there. . . . R. 797, Work Dep. of 1-26-82, p. 222. That meeting was a comfort — the word 'comfort' is a bond counsel word. You get comfort opinions. The word has a fixed meaning in the bond counsel field of practice. That meeting was designed to and did represent to the General Motors Corporation that the highest level of officialdom . . . in the State of Oklahoma, the Governor, the majority of the Oklahoma Tax Commission, and the Attorney General reiterated, reaffirmed that the current state of the inducement package, which included ad valorem tax relief and

sales tax relief on plant construction was and would continue to be the law of the land in the State of Oklahoma.

"And I might say that those officials did an outstanding job of reaffirming to General Motors that that was the law and would continue to be the law, and that if they came here they could take advantage of that law." *Id.* at 227-28.

Central to the understanding of all concerned was the position of the Attorney General in the fall of 1976. There was no mistaking his advice about what Oklahoma law required and permitted. He advised that official Attorney General Opinion 69-156, dated March 20, 1969, which upheld the legality of tax abatement in Oklahoma, was still in force and in effect, that it reflected the law at that time, and that it applied to the proposed General Motors plant.⁴ At the request of General Motors, the Attorney General wrote the following letter of confirmation:

⁴ It is important to note that, in Oklahoma, Attorney General opinions are not merely advisory, they are binding on all public officials. *Rasure v. Sparks*, 183 P. 495 (Okla. 1919); *Pan American Petroleum Corporation v. Board of Tax Roll Corrections*, 510 P.2d 680 (Okla. 1973); *Grand River Dam Authority v. State*, 645 P.2d 1011 (Okla. 1982). They "prescribe substantive law", have "general applicability" and have the force of a "rule". *Grand River Dam Authority, Ibid.*

THE ATTORNEY GENERAL
LARRY DERRYBERRY

State Capitol

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October 5, 1976

Mr. Phillip A. Hoffman, Manager
Special Tax Projects
General Motors Corporation
3044 W. Grand Boulevard
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Re: Opinion No. 69-156

Dear Mr. Hoffman:

I am in receipt of your recent request as to whether the state of the law expressed in the above-captioned opinion, a copy of which is attached, is still in force and effect.

I have reviewed said opinion and find the conclusion reached to be a correct analysis of the state of the law in Oklahoma. Since the date of issue of said opinion, I have found no case decisions or legislation that would alter the conclusion reached therein.

Accordingly, it is my opinion that the state of the law expressed in Opinion No. 69-156 is still in force and effect.

Yours very truly,

/s/

LARRY DERRYBERRY

R. 304, GM Apdx. Ex. 20

All public officials involved at that time understood that tax abatements for new industry were lawful, and they communicated their assurances to General Motors and to others who relied on them.

II

Tax Abatement Inducements Were Authorized by the Oklahoma Legislature. The Particular Tax Abatement Contract with General Motors Was Authorized Implicitly by the Legislature When It Reenacted the Trusts for the Furtherance of Public Functions Act in 1977.

A. The Oklahoma Trusts for the Furtherance of Public Functions Act.

Oklahoma has a legislative history and a legislative policy of seeking out and inducing the location and expansion of industry in the State, dating from at least 1951 when the Legislature enacted the Trusts for the Furtherance of Public Functions Act, 60 O.S. §176 (the "Act").

The Oklahoma Supreme Court acknowledged in this case, Petitioner's App. at p. A-3, that since 1951 numerous facilities throughout Oklahoma were constructed pursuant to the Act and that since at least 1969 such properties were not taxed because of Attorney General's Opinion No. 69-156. *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 at 911 (Okla. 1980). The court acknowledged also that the Legislature considered such property not taxable, and that the first notice to public officials that it was taxable was the new Attorney General's Opinion of July 31, 1979. *Id.* at 913.

The Secretary-Member of the Oklahoma Tax Commission testified about how the law was interpreted and understood throughout the State at the time of the negotiation of the General Motors contract:

A. All right. My understanding along that line at that time, up until the issuance of the, I imagine you mean the attorney general's opinion which came out

in 1979, was that the property of any public trust in Oklahoma, title to which was held by the trust, with one or more governmental entities as beneficiaries of that trust, was by law and by case law and by opinion of the attorney general exempt from ad valorem taxation.

Q. Okay, sir. And did that view of the law which you just described apply throughout the entire state with respect to public trusts and property the title to which was held by public trust?

A. Yes, as long as it was a public trust which was organized pursuant to the correct sections of the Oklahoma statutes, as long as all of those requirements and conditions outlined therein were met, in other words, if you could say that it was a genuine public trust as envisioned by the Oklahoma statutes allowing for the creation of such trusts, yes, it was applicable across the board. R. 805, Merrill Dep. pp. 9-10.

B. The 1977 Amendment and Reenactment of the Act.

In 1977, the Legislature amended and reenacted the Act by adding Sections 178.7 and 178.8. The amendments required an "in lieu" payment each year following the tenth anniversary of the issuance of bonds with the payments to be equal to the amount of property tax which would have been owed had title to the property not been vested in a public trust. The effect of this was to limit future tax abatements to ten years.

In recognizing that tax abatement agreements for new industry, including the General Motors project, had been authorized previously, a Senator remarked: "I think that we have to recognize that we have got a condition that was created by this legislature in this State that has come up —

gone about over a long period of years. . . ." *Appendix to General Motors Brief of July 26, 1982*, below, p. 9. During the debate it was clear that tax abatements already established were regarded as "commitments" on the part of the State. *Id.* at 24-25. Another Senator, apparently opposing all tax abatement agreements, regarded them as "bribery" and argued that the State did not "need to bribe these people any longer." *Id.* at 16-17. Despite the expression of such strong views, the Legislature reenacted the Act and the aggressive state policy of industrial expansion through tax abatements continued until July 31, 1979.

III

Prior to July 31, 1979, Tax Abatement Contracts Were Approved by the Oklahoma Courts.

Soon following adoption of the Oklahoma Constitution in 1907, the Supreme Court of Oklahoma considered a contract by the State for tax exemption. *In re Assessment of the First National Bank of Chickasha*, 160 P. 469 (Okla. 1916). The case concerned bonds issued by the State to finance the construction of public buildings. The State officials involved, including the Governor, Attorney General, State Treasurer and State Taxing authorities, assured purchasers that the bonds were nontaxable. Under those circumstances the Oklahoma Supreme Court said that the transaction amounted to a contract that the bonds were nontaxable:

"Such was the construction placed upon the law by the then Attorney General, Governor, state treasurer and the state taxing authorities. The transaction between the state and the purchasers of its bonds amounted to a contract that the bonds should be nontaxable." *Id.* at 475.

The court concluded that:

"While the bonds of a state, held by the residents of a state by which they are issued, may be taxed by the state or by its lawful authority, such may not be done if there be a valid contract with the holder exempting them from taxation." *Ibid.*

Until July 31, 1979, no question concerning the validity of public trust contractual tax abatement was raised. All public officials understood the law to be that such properties were not subject to tax while titles were held by an agency of the State. R. 805, Merrill Dep. pp. 9-10. Decisions of the Supreme Court of Oklahoma since the *Chickasha Bank* case were understood to hold to the same effect. *State ex rel. City of Tulsa v. Mayes*, 51 P.2d 266 (Okla. 1935); *City of Hartshorne v. Dickinson*, 249 P.2d 422 (Okla. 1952); *Board of County Commissioners v. Warram*, 285 P.2d 1034 (Okla. 1955); *Sublett v. City of Tulsa*, 405 P.2d 185 (Okla. 1965). The July 31, 1979 ruling of the Attorney General and the consequent opinion of the Oklahoma Supreme Court were entirely unforeshadowed.

IV

The Dunbar Decision

Following promulgation of the new Attorney General's Opinion on July 31, 1979, and the taxation for the first time of public trust held properties, numerous lawsuits sprang up throughout the State. In short course, the Attorney General petitioned the Oklahoma Supreme Court to take original jurisdiction of one of the cases, alleging that the issue involved was of great public importance. The Attorney General argued that the legal documentation of the

agreements did not describe "leases", but rather they described "executory contracts" for the sale of property from a state agency to private interests. The court considered the issue without a factual record and adopted the Attorney General's theory. The court held that the interest of a "purchaser" under an executory contract is taxable. *State ex rel. Cartwright v. Dunbar*, 618 P.2d 900 (Okla. 1980).

Most of the "leases" utilized under contracts with the OIA were similar to the "leases" involved in the *Dunbar* test case, including the "lease" of the plant from OIA to General Motors. Therefore, it must be conceded that purchasers' interests under such a construction of the agreements are taxable.⁵ That is, they are taxable *unless* the obligation of the contract is impaired or due process has not been afforded, under the Constitution of the United States. As the Oklahoma Supreme Court expressed the issue in its opinion below:

"Our decision in *Dunbar* is controlling in the case at bar and GMC's property is subject to ad valorem taxation unless the disputed tax abatement agreement is legally enforceable." Petitioner's App. A-8 and A-12.⁶

⁵ While conceding this of necessity, Amicus believes that the court's narrow view of the nature and intent of these agreements is unjustified and may have resulted from the lack of a factual record. For example, the intentions of the parties to the contract and the use of lease language were not factors in the decision. Other state supreme courts have reached opposite results where more complete records had been established. *Cf. Petition of CM Corporation*, 334 N.W.2d 675 (S. Dak. 1983) and *State of Kansas v. Kansas Port Authority*, 636 P.2d 760 (Kan. 1981).

⁶ Although the parties to the tax abatement contract are in accord as to its terms, the Oklahoma Supreme Court here referred to it as "disputed." It is true that the Respondents did not concede that there was

CONCLUSION

Amicus OIA was a party to this case throughout the administrative protest and the trial court proceedings and is well acquainted with the record. Review of the record will prove that all public officials involved, including officials of OIA, the Governor's office, the Attorney General and the Tax Commission, acted in reliance upon the law as it existed at the time that the tax abatement contract was made. By rulings below, the new Attorney General and the Supreme Court of Oklahoma have swept aside all of these contracts as though they never existed. The court said that the contracts are void because neither the Legislature nor any public officials had the power under the State Constitution to contract for tax abatements:

"If the legislature has not acted within the framework of the Constitution, it has not acted. An unconstitutional statute confers no rights, creates no liability and affords no protection." Petitioner's App. at A-7.

The question now is whether the Constitution of the United States has conferred any rights, created any liability and afforded any protection. The holding of the Oklahoma Supreme Court ignored decisions of this Court which said that despite a period of disuetude the Contract Clause

⁶ (Continued)

a contract. But that is the way that Contract Clause cases usually come to court, and this Court will decide for itself whether a contract was made and what are its terms. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). In any event, the Oklahoma Supreme Court assumed the existence of the tax abatement contract in considering the federal constitutional law issues and in forging its opinion in this case. Petitioner's App. at p. A-7.

is not a dead letter and that it remains a part of the Constitution. A state's financial contract by which it agrees not to exercise a reserved power, is not automatically beyond the protection of the Constitution. That was the holding of this Court in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), although in *U. S. Trust* the reserved police power of the state was implicated whereas here the reserved power to tax is involved.⁷

The collision between the Contract Clause, the Taking Clause and the Due Process Clause on the one hand, and the State's reserved power to tax on the other, requires that the state's impairment of its own financial obligations be shown to be "both reasonable and necessary" and to "serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. at 29. The impairment must be "reasonable in light of the surrounding circumstances." *Id.* at 31. The courts of Oklahoma made no such analysis and could make no such findings. Moreover, they did not, could not, find that the impairment here was only a temporary alteration of contractual relations. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Oklahoma reaped all of the benefits of Petitioner's performance and the performance of many others under their contracts and then through the power of the State denied them the benefits that their performance was to earn. Ami-

⁷ *Munday v. Wisconsin Trust Co.*, 252 U.S. 499 (1920), referred to by Respondent, Attorney General of Oklahoma, in his letter of January 9, 1984, to the Clerk of this Court, is inapplicable. That case involved a claimed impairment of obligation of contract based upon application of an explicit statute in force and effect at the time the contract was entered into.

cus submits respectfully that if the Contract Clause and the Due Process Clause of the United States Constitution mean anything, they mean that the State of Oklahoma cannot do what it has tried to do to Petitioner and to others in this case. Cf. *Allied Structural Steel Co. v. Spannaus, supra*.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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